Supreme Court, U.S.
FILED
AUG 8 1997
CLERK

No. 97-68

In The

Supreme Court of the United States

October Term, 1996

WESTOWNE SHOES, INC.
AND CARL A. BIWER CO.,

Petitioners,

v.

BROWN GROUP, INC., BROWN SHOE COMPANY, FAMOUS FOOTWEAR COMPANY, BROWN GROUP RETAIL, INC., WOHL SHOE COMPANY AND BROWN GROUP INTERNATIONAL, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

RONALD M. WAWRZYN
*WALTER E. ZIMMERMAN
KEVIN A. BANASIK
FOLEY & LARDNER
777 East Wisconsin Avenue
Milwaukee, WI 53202-5367
414-271-2400
Attorneys for Respondents
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the court of appeals denied the Petitioners their "right to appeal" because it did not address in its written opinion every issue raised by the Petitioners in the precise manner or depth that the Petitioners had desired.

2. Whether the court of appeals was obligated to relieve the Petitioners of the consequences of failing to demonstrate the existence of a genuine issue of material fact in support of their claims by reversing the district court's entry of summary judgment.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

RESPONDENTS' BRIEF IN OPPOSITION..... 1

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED IN THIS CASE.... 1

COUNTERSTATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 6

I. THIS CASE CONTAINS NO IMPORTANT OR COMPELLING QUESTION OF FEDERAL LAW THAT NEEDS TO BE SETTLED BY THIS COURT 6

II. THIS CASE DOES NOT REFLECT A DEPARTURE EITHER FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS OR THIS COURT'S PRECEDENT ON SUMMARY JUDGMENT 12

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Amirmokri v. Baltimore Gas and Electric Co., 60 F.3d 1126 (4th Cir. 1995) 15

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) ... 12, 13

B.F. Goodrich v. Betkoski, 99 F.3d 505 (2d Cir. 1996) 15

Barr v. Matteo, 355 U.S. 171 (1967) 8

Blackburn v. Alabama, 354 U.S. 393 (1957) 8

Butler v. Ingalls Shipbuilding, Inc., 89 F.3d 582 (9th Cir. 1996) 15

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 12, 13

Continental Casualty Co. v. Hartford Fire Insurance Co., 116 F.3d 932 (D.C. Cir. 1997) 15

Gaspard v. Offshore Crane and Equipment, Inc., 106 F.3d 1232 (5th Cir. 1997) 15

Goldstick v. ICM Realty, 788 F.2d 456 (7th Cir. 1986) 10

Kairys v. Immigration and Naturalization Service, 981 F.2d 937 (7th Cir. 1992) 11

Lhotka v. United States, 114 F.3d 751 (8th Cir. 1997) 15

Lowe v. Angelo's Italian Foods, Inc., 87 F.3d 1170 (10th Cir. 1996) 15

Mainiero v. Jordan, 105 F.3d 361 (7th Cir. 1997) 11

Matsushita Electric Industries Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 12, 13

Messner Manor Associates v. Wisconsin Housing & Economic Development Authority, 555 N.W.2d 156 (Wis. App. 1996) 10

TABLE OF AUTHORITIES – Continued

Page

Miller v. LeSea Broadcasting, Inc., 87 F.3d 224 (7th Cir. 1996) 15

Oates v. Discovery Zone, 116 F.3d 1161 (7th Cir. 1997) 14

Penobscot Indian Nation v. Key Bank of Maine, 112 F.3d 538 (1st Cir. 1997) 15

Seal-Flex, Inc. v. Athletic Track and Court Construction, 98 F.3d 1318 (Fed. Cir. 1996) 15

Smith v. Marcantonio, 910 F.2d 500 (8th Cir. 1990) 14

State v. Waste Management of Wisconsin, Inc., 261 N.W.2d 147 (Wis. 1978) 11

Stella v. Town of Tewksbury, 4 F.3d 53 (1st Cir. 1993) 14

Suzuki of Orange Park, Inc. v. Shubert, 86 F.3d 1060 (11th Cir. 1996) 15

Terry Barr Sales Agency, Inc. v. All-Lock Co., Inc., 96 F.3d 174 (6th Cir. 1996) 15

United Naitonal Insurance Co. v. Tunnel, Inc., 988 F.2d 351 (2d Cir. 1993) 14

United States ex rel. Anderson v. Northern Telecom, Inc., 52 F.3d 810 (9th Cir. 1995) 14

Varrallo v. Hammond Inc., 94 F.3d 842 (3d Cir. 1996) 15

Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010 (7th Cir. 1991) 11

Westowne Shoes, Inc. v. Brown Group, Inc., 104 F.3d 994 (7th Cir. 1997) 5, 6, 7, 9, 10, 16

Witt v. Realist, 118 N.W.2d 85 (Wis. 1962) 9, 10

TABLE OF AUTHORITIES – Continued

Page

STATUTE

28 U.S.C. § 1291 7

RULES

Fed. R. App. P. 3 7

Fed. R. Civ. P. 1 ..... 1, 13

Fed. R. Civ. P. 56 ..... 4, 12, 14, 16, 17

Fed. R. Civ. P. 56(c) 1, 12, 17

Fed. R. Civ. P. 81 1

Sup. Ct. R. 10 ..... 2, 6, 16, 17

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, by their undersigned counsel, respectfully request that this Court deny the petition for the writ of certiorari to the United States Court of Appeals for the Seventh Circuit for review in this case.

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED IN THIS CASE

Fed. R. Civ. P. 1:

> Rule 1. Scope and Purpose of Rules
> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Fed. R. Civ. P. 56(c):

> Rule 56. Summary Judgment
>
> . . .
>
> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

. . . .

Sup. Ct. R. 10:

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be,

settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

COUNTERSTATEMENT OF THE CASE[1]

This case is singularly unfit for review by the United States Supreme Court. The case concerns nothing more than the propriety of the entry of summary judgment, in a diversity action raising only state law claims, where the nonmoving party has failed to raise a genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

The Respondents adopt and incorporate as the relevant facts those facts and determinations set forth in the decisions and orders of the district court (App. C at 14-57 and App. D at 58-64) and the opinion of the court of appeals (App. A at 1-11). The Respondents object to any characterization of the facts by the Petitioners that is inconsistent with the facts and determinations set forth in those decisions and orders and opinion.

The Petitioners filed a lengthy complaint in Waukesha County (Wisconsin) Circuit Court asserting a host

[1] Throughout this brief, reference to the Appendix submitted by the Petitioners with their Petition for a Writ of Certiorari will be made as "App. ___ at ___." Throughout this brief, reference to the Petition for a Writ of Certiorari filed in this case by the Petitioners will be made as "Pet. at ___."

of claims, mostly state law breach of contract claims, against the Respondents. The Respondents removed the case to the United States District Court for the Eastern District of Wisconsin and answered the complaint, also asserting state law counterclaims against the Petitioners. All of the substantive issues presented in the case involved Wisconsin law. Discovery established that the Petitioners' claims were baseless and the Respondents filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

In a thoughtful and careful decision and order, the district court reviewed the Petitioners' claims and the evidentiary record, and noted the absence of any genuine issue of material fact as to any claim asserted by the Petitioners. The Respondents' motion for summary judgment was granted, and judgment was entered dismissing the complaint.[2] The Petitioners appealed to the United States Court of Appeals for the Seventh Circuit.

---

[2] Based on a review of the undisputed facts, applying Wisconsin law, the district court found that each of the Petitioners' claims was without merit. The district court determined that the asserted "contracts" had not been demonstrated to have existed. The district court also determined that the Petitioners' conduct "was a business decision unrelated to anything that [the Respondents] might have promised," and accordingly dismissed the promissory estoppel claim in the absence of proof of an inducing promise. App. C at 27. The district court dismissed the negligent misrepresentation and strict responsibility misrepresentation claims because the Respondents had no legal duty to disclose information to the Petitioners and because the alleged misrepresentations were not of present or pre-existing fact. App. C at 34.

On appeal, the Petitioners chose to recast their basic arguments to emphasize the Wisconsin Fair Dealership Law (though no claim could be asserted thereunder due to the passing of the statute of limitations). In their principal and reply briefs, the Petitioners pursued a variety of issues relating to virtually all of their claims, notwithstanding the deficiency of the factual record.

The court of appeals, in a well-reasoned opinion, affirmed the district court's judgment dismissing the complaint. *See Westowne Shoes, Inc. v. Brown Group, Inc.*, 104 F.3d 994 (7th Cir. 1997) (Posner, C.J.); App. A at 1-11. Writing for a unanimous panel of the court of appeals, Chief Judge Posner specifically noted that the Petitioners had pursued a "blunderbuss full of charges, mostly based on the common law of contracts but with trademark and antitrust allegations thrown in. . . . " *Westowne Shoes*, 104 F.3d at 995; App. A at 1-2. Chief Judge Posner's characteristically efficient opinion focused primarily on certain basic issues that exemplified the meritless claims. For example, it was pointed out that the Petitioners failed to demonstrate with sufficient evidence the *existence* of the "contracts" alleged to have been violated or their reliance on any statements made by the Respondents. In addressing the other pertinent issues (i.e., promissory estoppel and misrepresentation), the court of appeals agreed with the district court's determination that no reasonable jury could find for the Petitioners because the alleged promises and representations by the Respondents neither induced the Petitioners to take any action nor caused the Petitioners any harm. As the court of appeals observed,

"the promise made no difference": "No harm, no tort." *Westowne Shoes*, 104 F.3d at 997; App. A at 6-7.

The Petitioners have filed a petition for a writ of certiorari from this adverse determination.

REASONS FOR DENYING THE WRIT

I. THIS CASE CONTAINS NO IMPORTANT OR COMPELLING QUESTION OF FEDERAL LAW THAT NEEDS TO BE SETTLED BY THIS COURT.

This case presents no substantive questions of federal law. The Petitioners' complaint raised a host of claims arising solely under Wisconsin law. In a thoughtful opinion, the district court entered summary judgment on all the Petitioners' state law claims. On appeal, the court of appeals considered the Petitioners' "blunderbuss of charges," and in an efficient and well-reasoned opinion affirmed the dismissal of the Petitioners' claims. Neither the district court nor the court of appeals has decided any issue of substantive federal law in this case, much less an "important" or "compelling" one, as required by Supreme Court Rule 10.

In an attempt to conjure a federal question that may somehow appear worthy of Supreme Court review, the Petitioners contend that they have been denied the "right of appeal" because the court of appeals "failed to address a major issue presented for review." *See* Pet. at 21. Specifically, the Petitioners assert that the court of appeals failed to consider their various breach of contract claims. *See* Pet. at 17-21. This assertion is incorrect. Indeed, in

pursuing this case, the Petitioners apparently confuse the right to *an* appeal with a right to *win* on appeal. They have had their appeal, they have lost it, and examination of their "right of appeal" argument shows that it borders on frivolity.

Though the Petitioners may be unhappy with the outcome, review of the pleadings clearly demonstrates that the Petitioners have been fully accorded their right of appeal. *See* 28 U.S.C. § 1291; Fed. R. App. P. 3. Following the district court's decision dismissing their claims on summary judgment (App. C at 14-57) and their unsuccessful subsequent motion for reconsideration by the district court (App. D at 58-64), the Petitioners gave notice of their appeal. In regular and due course, the appeal was fully briefed and argued.[3] After consideration of the issues on appeal, the court of appeals, by Chief Judge Posner, in an opinion evidencing his characteristic efficiency and clear reasoning, unanimously affirmed the entry of summary judgment against the Petitioners. *See Westowne Shoes, Inc. v. Brown Group, Inc.*, 104 F.3d 994 (7th Cir. 1997); App. A at 1-11.

Unhappy with this result, in an attempt to obtain a *second* bite at the appellate apple, the Petitioners then filed a petition for rehearing. App. L at 168-185. As the Petitioners admit, this petition explicitly articulated (among other issues) their belief that the Court had misunderstood the Petitioners' contract law claims. Pet. at 21; App. L at 169-79. The court of appeals considered these contentions but was

---

[3] In connection with the appeal, the Petitioners filed a principal brief (App. K at 125-167) and a reply brief. The court of appeals also held oral argument on the appeal. App. B at 12-13.

not moved. After considering the petition, the court of appeals denied the request for a rehearing.

The Petitioners evidently think that this Court offers them a *third* bite at the apple. They are, of course, mistaken. Discretionary review in the Supreme Court is limited primarily to cases that present conflict among the federal courts of appeals or involve important issues or compelling questions of federal law. *See* Sup. Ct. R. 10. Those criteria are not satisfied by this case, notwithstanding the Petitioners' creative arguments.

Though the Petitioners' argument is that they have been denied their "right of appeal," the reality is simply that they had their appeal and lost. The record shows that the Petitioners failed to convince the court of appeals of the merit of their full appeal. Indeed, the Petitioners' *actual* complaint relates to the court of appeals' *manner* of addressing their breach of contract claims in its written opinion. This does not, as the Petitioners believe (Pet. at 16-21), equate with a denial of their right of appeal, and the Petitioners cite no valid authority in support of their creative proposition.[4]

The Respondents wish to make it clear – the Petitioners' asserted breach of contract theories were in conflict wit the evidentiary record. Nevertheless, the district

---

[4] Petitioners' "authority," two cases decided by this Court forty years ago, is substantively irrelevant to the "right of appeal" argument made in this case. Neither *Blackburn v. Alabama*, 354 U.S. 393 (1957), nor *Barr v. Matteo*, 355 U.S. 171 (1957), has anything to do with the right of appeal or a petitioner's "right" to have an appellate court address every claim made on appeal.

court carefully considered these theories. Having considered all the claims, the district court determined that the *existence* of the contracts allegedly violated by the Respondents had not been established with the definiteness required under Wisconsin law. App. C at 20-25. *See also Witt v. Realist,* 118 N.W.2d 85, 93 (Wis. 1962).

On appeal, the court of appeals readily acknowledged the variety and nature of the Petitioners' claims, and explicitly observed the Petitioners' "blunderbuss" approach to the appeal.[5] The court of appeals also explicitly addressed the Petitioners' contract law claims in its opinion and found them deficient. In its consideration of these claims, the court of appeals articulated in simple and straightforward terms the very fundamental problem in the Petitioners' "breach of contract" arguments (already exposed in the district court):

> The absence of a *written* contract other than the irrelevant licensing agreement and the multitudinous sales contracts, also irrelevant, covering particular shipments of shoes to [the Petitioners'] stores is not critical to the common law contract claim. . . . What is critical is the absence of terms. [The Petitioners'] principal testified that he had a contract with [the Respondents], but he was unable to answer such questions as, When did the contract start? When or under what conditions does it terminate? Is the "purity" program a violation? Did [the Respondents] so far relinquish [their] rights

---

[5] *Westowne Shoes, Inc. v. Brown Group, Inc.*, 104 F.3d 994, 995 (7th Cir. 1997); App. A at 1-2.

> over [their] trademark as to entitle [the Petitioners] to sell another manufacturer's shoes from a store that holds itself out to be a Naturalizer dealership? What consideration did [the Respondents] receive for this trademark-endangering concession? The common law of contracts does not empower a court to write the parties' contract for them, *Witt v. Realist, Inc.*, 18 Wis. 2d 282, 118 N.W.2d 85, 93-94 (1962); *Messner Manor Associates v. Wisconsin Housing & Economic Development Authority*, 204 Wis.2d 492, 555 N.W.2d 156, 159 (App. 1996); *Goldstick v. ICM Realty*, 788 F.2d 456, 461-62 (7th Cir. 1986), but that is what [the Petitioners are] asking us to do.

Westowne Shoes, 104 F.3d at 996; App. A at 4-5 (emphasis in original). There being no evidence of the terms of *any* of the asserted "contracts," the breach of contract claims were properly found to be without merit as a matter of Wisconsin law.

Even if the court of appeals did not specifically discuss in detail each one of the Petitioners' alleged breaches of contract in its written opinion, the Petitioners certainly cannot complain that the court of appeals failed to consider the underlying issues. The Petitioners' failure under Wisconsin law to establish on the record the existence of the terms of one or more "contracts" related to *all* contract claims, including any claim of a supposed modification of such "contracts."

In any event, no rule of law obligates a court of appeals to provide litigants with a complete chronicle of its considerations and analysis. Nor can the Petitioners force the court of appeals to write an opinion that is

perfected to their liking. Appellate courts are not "performing bear[s]" that must "dance to each and every tune played on an appeal." *See State v. Waste Management of Wisconsin, Inc.*, 261 N.W.2d 147, 151 (Wis.), *cert. denied*, 439 U.S. 865 (1978); *Mainiero v. Jordan*, 105 F.3d 361, 364-65 (7th Cir. 1997) (Coffey, J.). *See also Kairys v. Immigration and Naturalization Service*, 981 F.2d 937, 940 (7th Cir. 1992) (Posner, J.) ("[p]rocedural fairness does not require an appellate court to discuss every issue raised by an appellant, let alone every word or act that might cast doubt on one piece of evidence"). It is a salutary and routine practice for a reviewing court to discuss only the principal dispositive arguments of the appeal, even though all issues receive consideration.[6] *See, e.g., Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1022 (7th Cir.), *cert. denied*, 502 U.S. 861 (1991). To force the courts of appeals to do otherwise would put them at the mercy of appellate litigants and their often prolix briefs.

Because the court of appeals did not deny the Petitioners their right of appeal, and because this case presents no important question of federal law, this case does not warrant review by this Court.

---

[6] Even if the Petitioners could show that the court of appeals neglected to consider a legal issue, the Petitioners do not even suggest that such consideration would have changed the outcome of this case.

II. THIS CASE DOES NOT REFLECT A DEPARTURE EITHER FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS OR THIS COURT'S PRECEDENT ON SUMMARY JUDGMENT.

The principles and standards governing summary judgment under Rule 56 are well-settled in light of this Court's 1986 trilogy of cases. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industries Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The standards are clear: Rule 56(c) mandates the entry of summary judgment where "there is no genuine issue as to any material fact and [where] the moving party is entitled to a judgment as a matter of law." *Celotex*, 477 U.S. at 322 (citing Fed. R. Civ. P. 56(c)). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48. A fact is material if, under the applicable substantive law, it "might affect the outcome of the suit." *Anderson*, 477 U.S. at 248. A "genuine" issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. To survive a proper motion for summary judgment, the nonmoving party

"must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industries*, 475 U.S. at 586.[7]

Existing summary judgment procedures, articulated by this Court, explicitly and implicitly recognize that factually and legally insufficient cases should be removed from the busy trial calendars of the federal district courts.[8] As a result of this Court's clear standards, the practical utility – indeed, the necessity – of summary judgment is unquestionable.[9] "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

---

[7] The "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor," although if the evidence "is merely colorable" or "is not significantly probative," then the summary judgment is proper. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

[8] "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. . . . " *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

[9] "Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." *Celotex*, 477 U.S. at 327.

The federal courts, heeding this Court's pronouncements, faithfully apply Rule 56 and use summary judgment as a useful tool to clear from crowded dockets those cases that are factually insubstantial. *See, e.g., Oates v. Discovery Zone*, 116 F.3d 1161, 1175 (7th Cir. 1997) (Rule 56 is "a tool of great utility in removing factually insubstantial cases from crowded dockets"); *United States ex rel. Anderson v. Northern Telcom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1995) (the summary judgment rule is the "principal tool" by which "factually insufficient claims or defenses [can] be isolated and prevented from going to trial"); *Stella v. Town of Tewksbury*, 4 F.3d 53, 55 (1st Cir. 1993) ("proper province" of summary judgment is "to weed out claims that do not warrant trial"); *United National Insurance Co. v. Tunnel, Inc.*, 988 F.2d 351, 355 (2d Cir. 1993) ("Summary judgment is a tool to winnow out from the trial calendar those cases whose facts predestine them to result in a directed verdict."); *Smith v. Marcantonio*, 910 F.2d 500, 502-03 (8th Cir. 1990) ("Summary judgment is designed to remove factually unsubstantial cases . . . from crowded district court dockets.").

There can be no question that, under the clear guidance provided by this Court, the courts of appeals vigilantly police the judgments of the district courts to ensure that Rule 56 is administered properly and fairly. That was done here. The court of appeals examined the rationale of the district court's entry of summary judgment and found it to be both consistent with the record and proper under Wisconsin law. Had Rule 56 been improperly applied by the district court, the court of appeals would have reversed the district court's judgment of dismissal. It cannot be said that any of the courts

of appeals do not hesitate to reverse district courts that have improperly entered summary judgment.[10]

The Petitioners ignore all of this and ask this Court to give them special treatment and extraordinary review. In arguing that the court of appeals failed to follow the summary judgment procedures by improperly finding

---

[10] *See, e.g., Penobscot Indian Nation v. Key Bank of Maine*, 112 F.3d 538 (1st Cir. 1997) (entry of summary judgment affirmed in part, reversed and vacated in part and remanded); *B.F. Goodrich v. Betkoski*, 99 F.3d 505 (2d Cir. 1996) (entry of summary judgment affirmed in part, reversed in part, and remanded); *Varrallo v. Hammond Inc.*, 94 F.3d 842 (3d Cir. 1996) (entry of summary judgment affirmed in part, and reversed and remanded in part); *Amirmokri v. Baltimore Gas and Electric Co.*, 60 F.3d 1126 (4th Cir. 1995) (entry of summary judgment affirmed in part, reversed in part, and remanded); *Gaspard v. Offshore Crane and Equipment, Inc.*, 106 F.3d 1232 (5th Cir. 1997) (entry of summary judgment reversed and remanded); *Terry Barr Sales Agency, Inc. v. All-Lock Co., Inc.*, 96 F.3d 174 (6th Cir. 1996) (entry of summary judgment reversed); *Miller v. LeSea Broadcasting, Inc.*, 87 F.3d 224 (7th Cir. 1996) (entry of summary judgment reversed and remanded); *Lhotka v. United States*, 114 F.3d 751 (8th Cir. 1997) (entry of summary judgment reversed and remanded); *Butler v. Ingalls Shipbuilding, Inc.*, 89 F.3d 582 (9th Cir. 1996) (entry of summary judgment affirmed in part, reversed in part and remanded); *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170 (10th Cir. 1996) (entry of summary judgment affirmed in part, reversed and remanded for further proceedings in part); *Suzuki of Orange Park, Inc. v. Shubert*, 86 F.3d 1060 (11th Cir. 1996) (entry of summary judgment reversed and remanded); *Continental Casualty Co. v. Hartford Fire Insurance Co.*, 116 F.3d 932 (D.C. Cir. 1997) (entry of summary judgment reversed and remanded); *Seal-Flex, Inc. v. Athletic Track and Court Construction*, 98 F.3d 1318 (Fed. Cir. 1996) (entry of summary judgment reversed and remanded).

facts against them (Pet. at 21-28), the Petitioners apparently confuse the pronouncement of a legal conclusion (*i.e.*, the absence of evidence sufficient to create a genuine issue of material fact) with factfinding. Review of the record shows that in affirming the district court's judgment, the court of appeals was merely reviewing the record that had been made and stating a legal conclusion based upon the undisputed facts and evidence in the record. After resolving all factual disputes in the Petitioners' favor (App. A at 2), the court of appeals agreed with the district court that a reasonable jury could not find in the Petitioners' favor on the promissory estoppel and misrepresentation claims because the alleged promises and misrepresentations neither induced the Petitioners to act nor caused the Petitioners harm. Reaching these legal conclusions does not constitute "impermissible factfinding."[11]

The court of appeals had a job to do: apply this Court's well-settled and clear standards. It did the job. It examined the record, "resolve[d] the factual disputes as favorably to [the Petitioners] as the record permit[ted]" (App. A at 2), and, like the district court before it, determined that no reasonable jury could find in the Petitioners' favor. *See Westowne Shoes,* 104 F.3d at 996-97; App. A at 6-7, 11. Having done so, the court of appeals complied with the mandate of Rule 56 and properly affirmed the district court's entry of summary judgment

---

[11] Even if the court of appeals did "find facts" against the Petitioners, it is not the function of this Court to correct factual errors or misapplication of properly stated rules of law. *See* Sup. Ct. R. 10.

in the absence of a genuine issue of material fact on the Petitioners' claims. *See* Fed. R. Civ. P. 56(c). Nothing in or about the court of appeals' opinion suggests that it so far departed from the usual course of judicial proceedings or from this Court's established standards governing summary judgment under rule 56 as would justify this Court exercising its supervisory powers. *See* Sup. Ct. R. 10.

Viewed in the context of the thousands of other cases decided upon summary judgment, this case is wholly unexceptional. It is just one case in a long line of cases reflecting the proper application of the summary judgment procedures – entry of summary judgment against a party who fails to produce evidence sufficient to create a genuine issue of material fact.

Because the court of appeals properly applied this court's clear standards governing summary judgment under Rule 56 in its review of the district court's decision, there is no reason for this Court to exercise its supervisory powers to review this case.

CONCLUSION

For the reasons discussed in this brief, the Respondents respectfully submit that the petition for a writ of certiorari should be denied.

Dated this 8th day of August.

Respectfully submitted,

RONALD M. WAWRZYN
*WALTER E. ZIMMERMAN
KEVIN A. BANASIK
FOLEY & LARDNER
777 East Wisconsin Avenue
Milwaukee, WI 53202-5367
Attorneys for Respondents
**Counsel of Record*